No. 83-700

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Petitioner,

v.

JOHN A. PAWLAK and JAMES STAFFORD,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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RESPONDENTS' MEMORANDUM IN OPPOSITION

PAUL ALAN LEVY
(Counsel of Record)
BENJAMIN N. CARDOZO SCHOOL OF LAW
55 Fifth Avenue
New York, N.Y. 10003
(212) 790-0448

ALAN B. MORRISON
ARTHUR L. FOX, II
PUBLIC CITIZEN LITIGATION GROUP
2000 P Street, N.W.
Washington, D.C. 20036
(202) 785-3704

Attorneys for Respondents

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

In making an award of attorneys fees, under *Hall v. Cole*, 412 U.S. 1 (1973), for vindication of rights guaranteed to union members by federal law, does the court lack the power to award fees for the time spent in litigating the basic fee issues, when it determines that such fees are necessary to prevent substantial dilution of the basic award?

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STATEMENT OF THE CASE

1. Facts

This proceeding arises out of a suit filed in October 1978 by two Teamsters, respondents John Pawlak and James Stafford, to vindicate their rights and those of their fellow Teamster members guaranteed by Title I of the Labor-Management Reporting and Disclosure Act of 1959 ("LMRDA"). Briefly stated, Count One of their complaint alleged that a provision in the constitution of the petitioner International Brotherhood of Teamsters ("IBT"), pursuant to which Pawlak had been fined, violated the Title I rights of Pawlak and all other Teamsters

to sue their union by imposing a penalty for the exercise of that right. Count Two alleged that Teamsters Local 764 had violated Title I by using the union mailing list to distribute a letter denouncing bylaws amendments proposed by respondents, while denying respondents the use of that list in making a response.

Count One of the complaint—the only one to which the IBT was a party—was decided on cross-motions for summary judgment. The district court invalidated Pawlak's fine and the constitutional provision on which it had been based and directed the IBT to publish the court's decision in its monthly magazine. *Pawlak v. Greenawalt*, 477 F. Supp. 149 (M.D. Pa. 1979). Count Two was resolved when Local 764 agreed to a consent decree governing mailings for the next bylaws campaign.

After the district court's judgment was upheld on appeal, 628 F.2d 826 (3rd Cir. 1980), and this Court denied certiorari, 449 U.S. 1083 (1981), respondents made repeated efforts to secure a compromise on attorneys fees in order to avoid costly and time-consuming fee litigation. These efforts were ignored by the IBT and came to nought with Local 764. Accordingly, plaintiffs filed a formal application for fees, relying on this Court's decision in *Hall v. Cole*, 412 U.S. 1 (1973). Both the IBT and Local 764 filed papers in opposition and, without presenting any evidence to contradict plaintiffs' affidavits, demanded an evidentiary hearing. In their oppositions, they challenged both the reasonableness of the hourly rates claimed and the time spent, and raised a number of other legal and factual defenses to the award sought.

Thereafter, the fee questions under Counts One and Two were resolved separately. As to Count Two, plaintiffs entered a stipulation with Local 764 which (a) fixed the amount of fees to be awarded, if any; (b) set forth two issues, the resolution of which would determine whether any fee would be awarded; and (c) stipulated

the record on which the two issues would be decided. Both issues were resolved in plaintiffs' favor, and the grant of fees against Local 764 on Count Two is not before this Court.

The IBT, by contrast, was not in any way amenable to settling or even simplifying the fee proceeding on Count One. It refused to stipulate facts which it had no intention of contradicting on the ground that plaintiffs should "carry their burden of proof" in an evidentiary hearing. The IBT conducted extensive document discovery and took lengthy depositions of two of plaintiffs' counsel, during which it inquired broadly into the activities of union dissident groups and their lawyers. Rather than refusing to answer such questions, and thereby further delay the matter, counsel responded to them, recognizing, correctly as it turned out, that the IBT would use the information gathered to attack Teamster reformers in letters and union newspapers. In fact, the IBT so dragged out the attorney fee proceeding that plaintiffs' counsel spent *more than twice as much time on the fee application as they did on the litigation of Counts One and Two combined.* The IBT was, no doubt, encouraged to adopt this posture by its hope that no fees would be granted for litigating the fee proceeding.

2. Decisions Below

A. *District Court*

After considering depositions, exhibits, and the evidence at a one-day hearing, Magistrate Raymond Durkin recommended that no fees at all be awarded because he believed that plaintiffs' time records did not contain the information required by a Practice Order issued by District Judge Malcolm Muir. App. 12a. He also recommended that, even if the records were found to be adequate, no fees should be awarded for time on the fee proceeding. In reaching this conclusion, the Magistrate

relied on *Lindy Bros. Bldrs. Inc. v. American Radiator & Std. Sanitary Corp.*, 540 F.2d 102 (3rd Cir. 1976), an antitrust class action in which the plaintiffs' counsel were denied fees for litigating their fee application where the fees were to be paid from a common fund created by a settlement.

Pursuant to 28 U.S.C. § 636(b)(1), the district court reviewed the matter *de novo* and rejected both recommendations. It found, for the most part, that plaintiffs had complied with the requirements of its Practice Order, that the hourly rates sought were reasonable, and, after disallowing certain hours for which it believed documentation was not sufficient, awarded a fee of $11,801.25 for litigation on the merits of Count One. App. 61a-63a. Although the case had been pending for nearly four years, the court denied plaintiffs' request for an increase in fees to compensate for the delay in payment and for a multiplier for the contingency involved or the expertise of plaintiffs' counsel. App. 63a-64a.

The court also rejected defendants' argument that no fees could be awarded for time spent on the fee application. App. 62a. The court distinguished this case from the common fund situation in which any fee is deducted from the damages recovered, observing that the benefit here was not a sum of money, but an affirmation of the civil rights of union members. Furthermore, the court reasoned, not only would the award not reduce this benefit, it would actually benefit the union membership as a group by its implicit promise that they too could secure counsel to vindicate their rights and know that any fee awarded would not be so diluted by the fight to obtain it that it would become nearly worthless. For those reasons, the court found it appropriate to award fees for the time spent in obtaining the basic fee award. *Id.* Because of the IBT's intransigence on the fee issue, the award for time devoted to the fee issue came to $25,293.60, more than twice the fee for work on the merits, which had

been litigated in the district court, the court of appeals, and this Court. App. 63a, 71a-72a.

B. *Court of Appeals*

A unanimous court of appeals recognized that the issue of fees for fees in a union democracy case was an issue of first impression at the appellate level. App. 91a. After carefully reviewing the relevant case law, and considering the policy implications of the decision below, it affirmed the award of fees for time spent on the fee proceeding. App. 91a-98a.[1] Although fees are normally awarded for time spent in obtaining a fee in cases brought to vindicate statutory rights, App. 95a, the Third Circuit, sitting *en banc*, had previously ruled that "fees for fees" were not generally allowable when the fee was to be paid out of a common fund. *Lindy Bros. Bldrs. Inc. v. American Radiator & Std. Sanitary Corp.*, 540 F.2d 102, 110 (3rd Cir. 1976) ("*Lindy Bros.*"). In such cases, the court observed in *Lindy Bros.*, counsel fees reduce the recovery which the class obtains, and it would be unfair to the class members to reduce that amount still further by counsels' litigating their own fee application. *Id.* at 110-111.

In a Title I case, by contrast, the fee is awarded because plaintiffs' attorneys have created a non-monetary common benefit for the union membership, *Hall v. Cole*, 412 U.S. 1 (1973), and that benefit would not be reduced by the fee award. App. 95a. Indeed, the court stated, if fees were not awarded for the fee litigation, the effective rates for time spent on the merits would be reduced, and attorneys would be discouraged from taking Title I cases. App. 97a. The court recognized that this case was more analogous to a statutory fee award than to a common

[1] It also upheld the hourly rates on which the fees were based, but remanded for a further allocation of the time spent on the merits of Count One between the time properly chargeable to the IBT and that chargeable to Local 764. App. 88a, 89a.

fund case, and accordingly ruled that an award for time spent on the fee application was appropriate.

REASONS FOR DENYING THE WRIT

THE DECISION OF THE COURT OF APPEALS IS FULLY CONSISTENT WITH THIS COURT'S DECISIONS IN *ALYESKA PIPELINE* AND *HALL v. COLE* AND IS NOT IN CONFLICT WITH ANY APPELLATE COURT RULING.

Petitioner urges that review be granted because the decision below conflicts with this Court's opinion in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975), and is contrary to the Third Circuit's own ruling in *Lindy Bros., supra.* As demonstrated below, neither reason provides a basis for granting certiorari, and the ruling that the district court had the power to award fees for fees is fully supported by *Hall v. Cole*, 412 U.S. 1 (1973).

In *Hall v. Cole*, this Court held that attorneys fees may be awarded in union democracy cases based on the historic power of equity courts to award fees in cases where the plaintiff creates a common benefit for members of a group, such as a labor union. The Court reasoned that a union member who sues his union under Title I of the LMRDA vindicates not only his own rights, but the rights of other union members, and may properly be awarded attorneys fees from the union's treasury for creating this common benefit. 412 U.S. at 7-8. Indeed, the Court recognized that such awards were necessary to vindicate the statutory purpose of the LMRDA, inasmuch as individual workers normally cannot afford to pay their own attorneys to litigate against the sophisticated counsel of a large international union. 412 U.S. at 13-14. The IBT does not deny the applicability of that principle to fees for litigating the merits of this case.

Nor does the union take issue with the general rule that in cases involving statutory fees, courts have the power to award fees for time spent on the litigation of a fee petition. *See* cases cited at 95a. Rather, it argues that the ruling below is inconsistent with this Court's decision in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975) (Pet. at 8-11), and that the Third Circuit erroneously failed to follow its own decision in *Lindy Bros.*, *supra*, in which that court declined to allow attorneys who created a fund to reduce it by charging that fund for the time spent in justifying their fee. Pet. at 11-14.

The alleged conflict with *Alyeska* is based on a misreading of that opinion. In *Alyeska* this Court ruled only that federal courts had the power to order "fee-shifting" only in cases specifically covered by statutes or those following long-standing common law exceptions, such as the common benefit theory relied on here. Accordingly, because the court of appeals in *Alyeska* had awarded fees under a private attorney general rationale, which was not recognized at common law, this Court concluded that the lower courts had no power to make such an award. In reaching that result, the Court specifically reaffirmed the common benefit rationale and *Hall v. Cole* (*see* 421 U.S. at 257-260), but said nothing whatsoever about the issue presented here.

While it is clear after *Alyeska* that only Congress has the power to add to the common law exceptions to the general prohibition against fee-shifting, that has nothing to do with the question of whether, once fee-shifting is authorized, a court of equity has the power, in order to do justice, to award fees for the time spent in obtaining the basic fee award. In short, since nothing in *Alyeska* dealt with that question, petitioner's attempt to find an inconsistency with *Alyeska* must be rejected.

The second reason offered for granting review—that the court below misapplied *Lindy Bros.*—is an even less

appropriate basis. Initially, it should be noted that the claimed inconsistency is not between the decision below and a decision of this Court or of another circuit. Rather, petitioner claims that the Third Circuit's failure to apply its own *en banc* decision in *Lindy Bros.* to this case is a reason for this Court to grant review, even though petitioner never asked the Third Circuit itself to consider the question *en banc*.[2]

Moreover, the Third Circuit correctly distinguished between denying an attorney a fee for the time spent obtaining that fee, where the fee will be paid by the fund created as a result of a settlement of a commercial antitrust case, and allowing fees for fees where an attorney has created a benefit for all members of a labor union by vindicating the civil rights of the plaintiff and other union members guaranteed by Title I of the LMRDA. Not only is there no stark conflict of the kind noted in *Lindy Bros.* between the interests of attorneys and those of beneficiaries of the fund, 540 F.2d at 110, but, as the Third Circuit recognized, the fee award itself provides a common benefit to the membership. Thus, the fee award, like the reinstatement of an expelled member or the rescission of a fine, implicitly offers the membership added protections under the statute, by holding out the promise that they, too, will be able to obtain counsel if their rights are violated, secure in the knowledge that counsel will be paid a reasonable, not a diminished fee, if they prevail.

Were the law otherwise, the purpose of the LMRDA, as declared in *Hall v. Cole*, could easily be defeated. In a case such as this, where the union's salaried in-house counsel had every incentive to drag out the fee applica-

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[2] Not only is there no inter-circuit conflict, but the decision below is in accord with *Cole v. Hall*, 356 F. Supp. 460 (E.D.N.Y. 1975), *on remand from Hall v. Cole, supra.* In addition, in *Maceira v. Pagan*, 698 F.2d 38, 42 (1st Cir. 1983), the court allowed fees for time litigating fees in a Title I LMRDA case, without expressly considering the propriety of that award.

tion, the denial of a fee for obtaining fees would have reduced by some 75% the effective hourly rate for time spent on the merits. Such low hourly rates would not attract the type of competent counsel required to litigate Title I cases against union attorneys who are well versed in labor law. This result would be contrary to the interests of union members and would undermine the Congressional policy in enacting Title I.

Petitioner also suggests that the court of appeals' ruling will "inevitably encourage protracted fee litigation." Pet. at 8. However, examination of the incentives involved, as well as the record of this case, demonstrates that the decision below will do precisely the opposite—*i.e.*, it will encourage settlement of Title I fee cases.

Because most international unions have salaried, in-house counsel who can be assigned to a fee proceeding, they need not pay prevailing hourly rates in order to litigate fee petitions. If fees are not available for fee proceedings, a union's incentives not to compromise are significantly increased. From the union's perspective, prolonging the fee litigation will reduce the effective hourly rate for union democracy litigation and, therefore, discourage lawyers from taking similar cases in the future. Thus, union counsel would have every incentive to prolong the fee dispute, knowing that their client's only additional costs would be nominal ones for out-of-pocket expenses. On the other hand, by awarding fees for fees in cases under the LMRDA, the courts create incentives for unions to attempt to settle fee petitions rather than fight them. *Cf. Copeland v. Marshall*, 641 F.2d 880, 899 (D.C. Cir. 1980) (*en banc*).

Accordingly, reasons of sound judicial administration, although not alone a sufficient basis for the decision of the court of appeals, provide additional support for its determination that fees should be available for the fee portion of a union democracy case. As Professor Archi-

bald Cox, a "principal consultant to the draftsmen" of the LMRDA,[3] observed shortly after the LMRDA was enacted,

> The effectiveness of the new law will depend largely upon the initiative and energy of union members . . . [T]here is the danger, often expressed in the past, that individual employee's suits are neither an effective sanction nor a practical remedy. Workers are unfamiliar with the law and hesitate to become involved in legal proceedings. The cost is likely to be heavy, and they have little money with which to post bonds, pay lawyer's fees and print voluminous records. . . . Even if the suit is successful, there are relatively few situations in which the plaintiff or his attorney can reap financial advantage. Most men are reluctant to incur financial cost in order to vindicate intangible rights.

Cox, *Internal Affairs Of Labor Unions Under The Labor Reform Act of 1959*, 58 Mich. L. Rev. 819, 852-53 (1960). If the federal courts lack power to require unions to pay a reasonable fee for the time spent by attorneys in Title I cases, the odds against member suits brought to vindicate their democratic rights would mount, and the Title I Bill of Rights for union members would become largely illusory.

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[3] *Trobovich v. United Mine Workers*, 404 U.S. 528, 535 (1972).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

PAUL ALAN LEVY
(Counsel of Record)
BENJAMIN N. CARDOZO
SCHOOL OF LAW
55 Fifth Avenue
New York, N.Y. 10003
(212) 790-0448

ALAN B. MORRISON
ARTHUR L. FOX, II
PUBLIC CITIZEN
LITIGATION GROUP
2000 P Street, N.W.
Washington, D.C. 20036
(202) 785-3704
Attorneys for Respondents

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